

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

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APR 22 2004

In the Matter of

Amendment of Section 73.202(b))
FM Table of Allotments,)
FM Broadcast Stations)
(Magnolia, Arkansas and Oil City,)
Louisiana))

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

MB Docket No. 02-199
RM-10514

To: The Commission

REPLY
OF
ACCESS.1 LOUISIANA HOLDING COMPANY, LLC

I. INTRODUCTION

Access.1 Louisiana Holding Company, LLC ("Access 1"), pursuant to Section 1.115 of the Commission's Rules, 47 CFR Section 1.115, hereby submits its Reply to the Opposition filed April 9, 2004 by Columbia Broadcasting Co., Inc. ("Columbia").

The principal issue to be decided by the Commission in this proceeding is whether it is in the public interest to allow Columbia to obtain a reallocation of a frequency from a rural community 65 kilometers (40.4 miles) away, to serve 100% of the Shreveport Urbanized Area.¹ In its Application for Review, Access.1 has demonstrated at length why grant of this reallocation is not in the public interest. In this Reply, Access.1 will address some of the most unsupported arguments made by Columbia in its Opposition.

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¹ Access 1 Application for Review, filed March 25, 2004.

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II. COLUMBIA FAILED TO DEMONSTRATE THAT IT DID NOT LACK CANDOR AND MISREPRESENT FACTS TO THE COMMISSION

In its Opposition, Columbia attempts to gloss over its misrepresentation. Columbia argues that, because the Bureau reached the same decision on reconsideration, Columbia's nondisclosure of a material fact was irrelevant. This is not the way in which the Commission analyzes misrepresentation questions. The issue is: did Columbia intentionally withhold information with an intent to deceive the Commission, and was there a benefit to be derived by Columbia through such deceit? The answer to both of these questions is "yes." Columbia knew that it was leaving the Commission with a false impression when it failed to disclose the filing of the construction permit application amendment. And, Columbia knew that there was a clear benefit to it by withholding this information. Columbia knew that the Commission might rule against it in the *Tuck*² analysis. Therefore, Columbia had a clear motive to conceal the filing of its application amendment from the Commission staff processing Access 1's Petition for Reconsideration. That the Bureau later decided in favor of Columbia is irrelevant to the question of whether there was actual misrepresentation and lack of candor.

Columbia also argues that its two-step scheme to evade review under *Community of License*³ was not a scheme at all, but just the normal process for handling a reallocation. This is most disingenuous. The rules do not require that a party hide its true signal coverage plans. When improperly applied by the Bureau, the procedures permit such deception, but they certainly do not require it. Columbia should have come in with its initial reallocation proposal, presented a *Tuck*

² *Faye & Richard Tuck*, 3 FCC Rcd 5374, 65 RR 2d 402 (1988) ("*Tuck*").

³ *Modification of FM and TV Authorizations to Specify a New Community*, 4 FCC Rcd 3870 (1989), *recon granted in part*, 5 FCC Rcd 7094 (1990) ("*Community of License*").

analysis at that time and addressed all of the issues now before the Commission in a single filing. Only if there is a plan to deceive is it necessary to go through the many steps that Columbia went through.

Indeed, with regard to the alleged lack of a plan to deceive, Columbia's counsel asserts that Columbia had no plan to use the site that it now proposes to use until just before the amendment was filed.⁴ However, there is no record evidence to support this assertion by counsel. Throughout this proceeding, Columbia has been silent about when it developed its plan to cover 100% of the Shreveport Urbanized Area. There are no affidavits or declarations from any officer, director or other employee of Columbia setting forth any representations about when Columbia devised its plan to use the site from which it will cover 100% of the Shreveport Urbanized Area. The assertions of counsel that there was no plan to evade the *Community of License* policy, without a supporting affidavit or declaration from a person in authority at Columbia, can be given no weight.

III. COLUMBIA FAILED TO DEMONSTRATE THAT THE COMMISSION'S COMMUNITY OF LICENSE DECISION WAS APPROPRIATELY APPLIED IN THIS CASE OR THAT THE BUREAU'S *TUCK* ANALYSIS WAS CONSISTENT WITH THE POLICY ESTABLISHED IN *COMMUNITY OF LICENSE*

Columbia argues that the Bureau's *Tuck* analysis is consistent with the Commission's *Community of License* policy. However, Access.1 demonstrated in its Application for Review that the Bureau gave too little weight to the first two *Tuck* factors. Access.1 showed that Columbia planned to cover the entire Shreveport Urbanized Area, that Oil City is dwarfed by the Shreveport Urbanized Area, and that Oil City is in close proximity to Shreveport.⁵ Therefore, a correct

⁴ Columbia Opposition at 8-9.

⁵ Access 1 Application for Review at 18.

application of the *Tuck* analysis to the *Community of License* policy by the Bureau would have resulted in a denial of Columbia's petition based solely on these facts.

The Bureau, however, proceeded to consider whether, Oil City is independent of Shreveport. Access.1 submitted information demonstrating that Oil City is not independent of Shreveport. Columbia argues that the Commission may not consider Access.1's submission, because the Bureau ruled that it was untimely. However, the Bureau had the information before it and chose not to consider it. This is not a situation where the Bureau "has been afforded no opportunity to pass" on the issues raised by Access.1's Supplement. The Bureau simply chose not to review the material. Thus, section 1.115(c) is not a bar to consideration of the Supplement by the Commission.⁶

Columbia argues that, when the Commission adopted the *Community of License* policy, the Commission contemplated that some rural stations might be reallocated to urban areas. Columbia argues that Access.1's challenge to that process in this proceeding merely repeats arguments raised at the time the policy was adopted. However, Access.1 has demonstrated that the policy has been abused by Columbia in this proceeding, and by other parties in other proceedings.⁷ Thus, it is time for the Commission to assess the effectiveness of this policy. When the Commission adopted the policy, it acknowledged that it might become necessary to reassess the policy at a later time.⁸ That time is now

Columbia argues that the Commission's recently announced policy to use Arbitron markets to define radio markets has no bearing on the Commission's allotment policies. Columbia fails to recognize that if the Commission's *Community of License* policy has been used to create a new

⁶ Columbia also argues that the Supplement causes Access.1's Application for Review to exceed the page limit set forth in Section 1.115(f). While this is a questionable reading of Section 1.115(f), to the extent the Supplement might raise an issue under the page limitations of Section 1.115(f), Access.1 hereby requests a waiver of that section for the limited purpose of allowing consideration of the Supplement.

⁷ Access.1 Application for Review at 16-17.

⁸ *Community of License* at para. 14.

station in the Shreveport Arbitron market, it calls into question whether there is a rational basis for the reallocation policy as applied here. If the policy merely facilitates the migration of rural stations to urbanized areas, the policy objectives of *Community of License* and Section 307(b) are not being served. This undermines any legal basis for treating the Oil City allotment as anything other than a Shreveport Arbitron station, and hence, a Shreveport reallocation.

IV. CONCLUSION

Therefore, Access.1 requests that the Commission review and reverse the Bureau's decision that reallocated Channel 300C1 from Magnolia, Arkansas to Oil City, Louisiana and provide the additional relief requested in Access.1's Application for Review.

Respectfully Submitted,

ACCESS.1 LOUISIANA HOLDING COMPANY, LLC

By its Attorneys,



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April 22, 2004

CERTIFICATE OF SERVICE

I, Kathy Nickens, a secretary in the law firm of Rubin, Winston, Diercks, Harris & Cooke, L.L.P., do hereby certify that the foregoing "Reply" was mailed this 22nd day of April, 2004 to the following.

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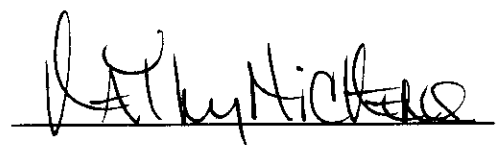
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A handwritten signature in black ink, appearing to read "Kathy Nickens", written over a horizontal line.

Kathy Nickens